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No. .....

In The
Supreme Court of the United States
October Term, 1983

STATE OF IDAHO,
Petitioner,

and

MEMBERSHIP OF HEYBURN STATE PARK LEASEHOLDERS ASSOCIATION,
Intervenor/Petitioner,

vs.

THE COEUR D'ALENE TRIBE OF INDIANS,
Intervenor/Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

JIM JONES
Attorney General of Idaho

ROBIE G. RUSSELL
Deputy Attorney General
State of Idaho

C. A. DAW
Deputy Attorney General
State of Idaho
Room 210, Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

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TABLE OF CONTENTS

EXHIBIT I

STATE OF IDAHO, Plaintiff-Appellee,

and

Membership of Heyburn State Park Leaseholders Association, Plaintiff/Intervenor Appellee,

v.

The Honorable Cecil D. ANDRUS, Secretary of the Department of the Interior of the United States of America, Defendant/Appellant,

and

The Coeur d'Alene Tribe of Indians, Defendant/Intervenor Appellant.

No. 80-3013.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 6, 1981.

Remanded Aug. 5, 1981.

Resubmitted on Filing of Supplemental Briefs.

Decided Dec. 1, 1983.

Before: KILKENNY and SNEED, Circuit Judges, and QUACKENBUSH, District Judge.*

KILKENNY, Circuit Judge:

FACTS

On April 30, 1908, Congress authorized the State of Idaho to purchase from the United States land withdrawn from the Coeur d'Alene Indian Reservation, Act of 1908, ch. 153, 35 Stat. 70, 78. In 1911, the land was conveyed to the state by patent, which contained language requiring that the property be used solely for park purposes. The United States was given a reversionary interest and a

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*The Honorable Justin L. Quackenbush, United States District judge for the Eastern District of Washington sitting by designation.

right of re-entry to the land if it were not maintained as a public park.

After the state began a private cottage leasing practice, the Coeur d'Alene Indian Tribe (Tribe) claimed that the practice violated the condition subsequent language of the patent. Following investigation into the uses to which the land was being put, the state brought suit in the Idaho District Court seeking a declaratory judgment that it was in compliance with the patent condition. The United States later filed suit, claiming that the patent's condition had been breached and seeking to quiet title to the property. The suits were consolidated for trial and the Tribe was granted limited leave to intervene as a defendant.

The district court, 566 F.Supp. 15, granted summary judgment in favor of the state. Both the United States and the Tribe appealed. A panel of this court granted the United States' motion for voluntary dismissal of its appeal and denied the Tribe's motion for reconsideration of the dismissal. Prior to oral argument on the Tribe's appeal, the state moved to dismiss the appeal on the ground that the reversionary interest flowed solely to the United States and, therefore, no case or controversy existed as to the Tribe. This panel then remanded to the district court for the limited purpose of determining whether the Tribe possessed a beneficial interest in the reversion. The district court held that the Tribe lacked a beneficial interest. The Tribe appeals. We reverse.

HISTORICAL BACKGROUND

The Coeur d'Alene Indian Reservation was established by Executive Order in 1873 and comprises roughly 590,000 acres. In consideration, the Tribe agreed through an unratified 1873 Parley and Agreement to cede approx-

imately four million acres of aboriginal land to the United States. In 1981 the Tribe formally ceded to the United States the tribal aboriginal land outside the 1873 reservation, Act of 1891, ch. 543, 26 Stat. 989, 1027. Appropriation bills were passed to compensate the Tribe and its members for the land ceded.

Pursuant to the Allotment Act of 1906, ch. 3504, 34 Stat. 325, 335, Congress authorized allotment of 160 acres of reservation land to each tribal member, and opened for homestead entry the unallotted lands. The Act provided in part as follows:

> That the Secretary of the Interior . . . is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, ...

34 Stat. at 335. The receipts from the sales were to be deposited in the United States Treasury to the Tribe's credit, and the monies were to be spent for their benefit. The purpose of the Act was

> [m]erely *to have the United States . . . act as trustee for said Indians* in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales. . . . [Emphasis added]

34 Stat. at 337.

Before the reservation was opened for settlement, however, Congress withdrew a portion of the land, comprising 6,774.65 acres, from allotment and settlement by the Act of 1908, ch. 153, 35 Stat. 70. The Act authorized the Secretary of the Interior to convey the land to the State of Idaho for use as a public park:

> That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to-wit . . . is *reserved and withdrawn* from allotment and settlement, and the *Secretary of the In-*

> *terior* is hereby *authorized to convey any part thereof* to the State of Idaho to be maintained as a public park, said conveyance to be made for such consideration . . . as the Secretary of the Interior shall prescribe. *The proceeds of such sale shall be deposited in the Treasury of the United States for the benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.* [Emphasis added]

35 Stat. 78, 79.

Subsequently, the land was conveyed to the state for $11,379.17 on June 28, 1911, under a patent setting forth the following conditions:

> Whereas, the Act of Congress . . . authorizes the conveyance to the State of Idaho of the following described subdivisions . . . , *formerly a part of the Coeur d'Alene Indian Reservation* in Idaho . . . .
>
> Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17 and said Secretary has directed that said lands be conveyed to the state, upon payment . . . , upon the following terms and conditions, to-wit: *the lands are to be by said state held, used, and maintained solely as a public park, . . . , the title to revert to the United States . . . , absolutely if the said lands, . . . , shall not be, . . . , so used and maintained by the state,* . . . and in the event of the violation by the state of any of the conditions . . . , then the United States may . . . enter upon, and into the exclusive possession of, the said lands, . . . , and have, hold, seize, and possess the same: . . . . [Emphasis added]

ISSUES

(1) Did the Act of 1908, ch. 153, 35 Stat. 70, and its related legislation create or preserve a beneficial interest in the Tribe which it could assert in this litigation?

(2) Even if the Tribe does have a beneficial interest, does the United States' voluntary dismissal from this appeal preclude the Tribe from appealing the case as well?

DISCUSSION

The State of Idaho (state) and the Heyburn State Park Leaseholders Association argue that the Act of 1908 disestablished the Coeur d'Alene Reservation and thereby extinguished Indian title and interest in the property. Consequently, the right of re-entry created in the patent of 1911 was created for the sole benefit of the United States. Further, voluntary dismissal by the United States precludes the Tribe from appealing the case.

The Tribe argues that the Act of 1908 failed to extinguish the Tribe's beneficial interest. The United States' trustee status, as created in the Allotment Act of 1906, therefore remains in force despite the Act of 1908. The Act of 1958, Pub.L. No. 85-420, 72 Stat. 121, restored title to the Tribe to the lands as well.

STANDARD OF REVIEW

[1, 2] Once Congress has established a reservation all tracts within it remain a part of the reservation until separated therefrom by Congress. *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909). Extinguishment of Indian title may be accomplished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *United States v. Dann*, 706 F.2d 919, 928 (CA9 1983) (quoting *United States v. Santa Fe R.R.*, 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941)).

[3,4] The general rule is that doubtful expressions are to be resolved in favor of the weak and defenseless

people who are wards of the nation, dependent upon its protection and good faith. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L. Ed.2d 129 (1973) (quoting *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930)). However, the general rule does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977).

[5] Congressional intent to abrogate rights reserved in Indian treaties and agreements must be expressed clearly and unequivocally. *Swim v. Bergland,* 696 F.2d 712, 717 (CA9 1983); *see Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, at 690, 99 S.Ct. 3055 at 3076, 61 L.Ed.2d 823 ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"); *Menominee Tribe v. United States,* 391 U.S. 404 at 413, 88 S.Ct. 1705 at 1711, 20 L.Ed.2d 697 ("[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty" (footnote omitted)).

[6] The question of whether title to Indian land has been extinguished is separate from the question of disestablishment. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 601 n. 24, 97 S.Ct. 1361, 1370 n. 24, 51 L.Ed.2d 660 (1977). While Congress has the authority to disestablish (diminish) a reservation and extinguish title, it may do either without the other. As the court in *Swim v. Bergland,* 696 F.2d 712 (CA9 1983) noted:

> [t]hese cases . . . stand for the undisputed proposition that the federal government, by withdrawing lands formerly open to sale or settlement, may lawfully assert a power to control the use of those lands by the public. . . . [n]othing . . . [in these cases] . . . suggest[s] that this distinction between "public domain" and "reservations" has any bearing on the question of how and when treaty rights of Indians in those lands are extinguished.

696 F.2d at 717.

[7] In the present case, therefore, our threshold task is to determine whether the Act of 1908 and its related legislation created or preserved a beneficial interest in the Tribe which it could assert in this litigation. In making that determination, we examine the face of the Act itself, its legislative history, and the surrounding circumstances. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977); *see Mattz v. Arnett,* 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

BENEFICIAL INTEREST IN TRIBE
FACE OF ACT

The Act of 1891, ch. 543, 26 Stat. 989, constitutes congressional action by which the Tribe gave up all rights they may have held to their tribal aboriginal land. The Act states in part as follows:

> For the consideration hereinafter stated the said Coeur d'Alene Indians hereby *cede, grant, relinquish, and quitclaim* to the United States *all right, title, and claim* which they now have, or ever had, to all lands . . . , except . . . , . . . the Coeur d'Alene Reservation. [Emphasis added]

26 Stat. 989, 1027 (1891). *See, e.g., DeCoteau v. District Cty. Ct.,* 420 U.S. 425, 439 n. 22, 95 S.Ct. 1082, 1090 n. 22, 43 L.Ed.2d 300 (1975).

The Allotment Act of 1906 created in the United States the role of trustee for the Tribe in the disposition and sale of the unallotted lands. The Act specifically provided that, after depositing the sale proceeds in the United States Treasury, the monies were to be expended toward th Indians' education, improvement, the purchase of livestock, farm implements and building materials. The Act also provided that the Tribe members were to receive a per capita payment out of the proceeds, and that any sums placed in the United States Treasury were to draw interest. 34 Stat. at 337. See *Ash Sheep Co. v. United States,* 252 U.S. 159, 165-66, 40 S.Ct. 241, 242-43, 64 L.Ed. 507 (1920) (similar language embodied in a cession agreement held to create relationship between United States and tribe of trustee and beneficiary).

[8] Given that the Act of 1906 did create a beneficial interest, that of beneficial ownership of the unallotted lands, we now consider whether the Act of 1908 extinguished that interest. The state has the burden of showing clear congressional intent to extinguish the Tribe's beneficial interest in the lands. See *DeCoteau v. District City Ct.,* 420 U.S. 425, 444-45, 95 S.Ct. 1082, 1092-93, 43 L. Ed.2d 300 (1975). Boundary diminishment of the reservation by the Act of 1906 does not, however, automatically relieve the United States of its trustee status. See *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 601 n. 24, 97 S.Ct. 1361, 1370 n. 24, 51 L.Ed.2d 660 (1977) (quoting Court of Appeals, "the fact that a beneficial interest is

retained does not erode the scope and effect of the cession made, . . ."); *Swim v. Bergland,* 696 F.2d at 716-17.

In *Hanson v. United States,* 153 F.2d 162 (CA10 1946), a 1902 Allotment Act provided for an allocation of acreage and a corresponding payment to each Indian following sale of the unallotted lands. In 1943 a trespass occurred on part of the unallotted lands. The Court of Appeals for the Tenth Circuit held:

> We think it clear that, while the legal title passed to the United States and the lands were subject to entry and sale, the beneficial title remained in the Indians and the United States held the lands as trustee for the Indians.

153 F.2d at 163. True enough, *Hanson* is distinguishable from this case in that the court's holding there applied to the undisposed of, unallotted lands, not to those lands withdrawn from entry and sale. Although some of the unallotted lands in *Hanson* were withdrawn from entry and sale, the court did not rule on the United States' trustee status as regards the withdrawn lands. However, *Hanson* is applicable here in that it supports the proposition that a trust relationship between the United States and an Indian tribe continues even though the United States has acquired legal title to the lands.

The district court found it significant that the Act of 1908 did not expressly state that the Secretary of the Interior would be acting as trustee for the Tribe, in view of the "trustee" language present in the Act of 1906. The court deemed this difference significant when it examined cases dealing with congressional intent to *diminish reservation boundaries. Compare DeCoteau v. District Cty. Ct.,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975)

(payment of sum certain important factor in finding relinquishment of tribe's right to land) *with Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (consideration of uncertain future sales of land to settlers important factor in finding that tribe retained interest in land).

[9] The district court's holding is not supported by the authorities. *DeCoteau* involved a land cession agreement, similar in terms to that of the Act of 1891 involving the Coeur d'Alene Indians. Further, the language used in the cession agreement in *DeCoteau* was, "[t]he . . . Indians hereby *cede, sell, relinquish, and convey* to the United States *all their claim, right, title, and interest in and to all the unallotted lands. . . .*" 420 U.S. at 445, 95 S.Ct. at 1093 [Emphasis added]. No similar language is present in the Act of 1908. The Supreme Court in *DeCoteau* never discussed whether the United States' trustee status survived the termination of the reservation. The district court also erred in relying on *diminishment* cases, which, as explained above, present a separate question from that of extinguishment. See *Swim v. Bergland*, 696 F.2d at 716-17.

Comparison of the Act of 1908 with language used in other statutes shows that the words "reserved and withdrawn" are not the same as any other language which the courts have found to be "explicit" language of fee title termination. *See, e.g., Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 955 n. 4 (CA9 1982) (Namen II) (discussing the Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 [reservation "is hereby discontinued"]; Act of July 1, 1892, ch. 140, 27 Stat. 62 ["Reservation . . . is vacated and restored. . . ."] Act of April 21, 1904, ch. 1402,

33 Stat. 189, 218 ["reservation lines . . . are hereby abolished"]. Nor is the language tantamount to the slightly less explicit language of cession which has been held to be "precisely suited" to diminish reservation boundaries. See *Namen II,* 665 F.2d at 955; *see also Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 597, 97 S.Ct. 1361, 1368, 51 L.Ed.2d 660 (1977) (tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest . . .").

The state argues that use of the word "convey" indicates that the United States was free to pass complete title to the state. In the absence of any affirmative showing of such meaning in the Act itself, it cannot be said that use of the word "convey" suggests clear congressional intent to extinguish title. In fact, the pertinent section of the Act reads that the Secretary is "authorized to convey any part . . . upon such terms and conditions as the Secretary of Interior shall prescribe." This language provides strong evidence for concluding that Congress intended that the Secretary of Interior would be executing the later patent in his role as trustee for the Tribe. See *Nevada v. United States,* — U.S. —, —, 103 S. Ct. 2906, 2923, 77 L. Ed.2d 509 (1983) ([t]he United States undoubtedly owes a strong fiduciary duty to its Indian wards (citation omitted)).

Finally, notwithstanding the state's argument that the "trustee" language contained in the Act of 1906 was not duplicated in the Act of 1908, the latter Act does state that the proceeds from the sale of the lands were to be deposited in the United States Treasury for the benefit of the Coeur d'Alene Indians. The state suggests that this language would be superfluous if the United States'

trustee status as established in the Act of 1906 remained in effect. This presents a no-win argument for the Tribe: either the language is not sufficient to constitute continuing trustee status on the part of the United States, *or* the language was inserted to obligate the United States to perform a duty even though no trustee status existed. The state's argument fails. The Act of 1906 clearly directs that the proceeds arising from the sale of the unallotted lands were to be

> deposited in the Treasury of the United States to the credit of the Coeur d'Alene . . . Indians . . . , and shall be expended for their benefit, under the direction of the Secretary of the Interior, ...

34 Stat. at 337.

Compare the above language to that present in the Act of 1908:

> The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

35 Stat. at 79. Except for the more detailed explanation in 1906 no significant difference exists between the two sections. That Congress may have intended the United States' trustee status to remain after passage of the Act of 1908 is as probable an explanation of congressional intent as it is that the status was not to continue. It cannot be said, therefore, that the face of the Act indicates clear congressional intent to extinguish the Tribe's beneficial interest.

LEGISLATIVE HISTORY

The district court held that the legislative history shows clear congressional intent to make a sale of all of

the withdrawn lands for a sum certain representing the appraised value of the lands. *Cf. DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

[10] We find the legislative history, at best, to be "equivocal." See *Namen II*, 665 F.2d at 956-57. First, the Congressional Record shows that Senator Heyburn, author of the original bill, S. 8316, which eventually died in the House, never intended a state park to be established.[1] Rather he tried to establish a national park. See 42 Cong. Rec. 3378 and 48 Cong.Rec. 8037-39. Similarly, it cannot be said that the Tribe ever consented to the taking of reservation land for a state park. Although tribal consent is unnecessary so long as compensation is paid, *see Swim v. Bergland*, 696 F.2d 712, 717 (CA9 1983), the wording of an agreement and the embodiment of such a prior agreement into statutory language is relevant in construing the import of questioned legislation:

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1. That the following subdivisions now embraced in the Coeur d'Alene Indian Reservation, in Idaho, to-wit: . . . is reserved and withdrawn from allotment and settlement and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people; *Provided*, That the Coeur d'Alene tribe of Indians shall be paid the appraised value of said lands, . . .

SEC. 2 That such public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such regulations as he may deem necessary or proper for the care and management of the same. . . . He shall provide against the wanton destruction of the fish and game found within the park and against their capture and destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same to be removed therefrom, and, generally, is authorized to take all measures as may be necessary or proper to fully carry out the objects and purposes of this section.

Heyburn Amendment, 41 Con.Rec. 3972 (1907).

> Polson urges us to assume that the Flathead Act expressed the same congressional policy and underlying purpose as three other statutes that were enacted within the same week to open all or part of three other reservations. (footnote omitted) Two of these statutes have been held to terminate the reservation status of the areas involved. ["The Rosebud Act terminated the reservation status of a portion of the Rosebud Sioux Reservation. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). The Crow Act terminated a portion of the Crow Reservation. *Hawkins v. Christ,* No. CV 76-99-BLG (D.Mont. January 27, 1978)" n. 13]. This argument, however, overlooks salient differences between the Flathead Act and the other three statutes. *All of the others purported to amend and ratify agreements previously negotiated with the affected Indians; they incorporated the text of those prior agreements; and they each contained explicit language of cession.* The Flathead Act does not purport to modify a prior cession agreement, since the Tribes had refused to make such an agreement. It contains no language of cession, but merely provides that after allotments to the Indians, the unallotted surplus "shall be disposed of under the general provisions of the homestead, mineral, and townsite laws of the United States." Flathead Act, § 8. [Emphasis added]

Namen II, 665 F.2d at 956-57.

Unlike *Rosebud,* nothing the precursor legislation in this case embodies language of cession ("cede, surrender, grant, and convey . . . all . . . claim, right, title and interest," *Rosebud,* 430 U.S. at 597, 97 S.Ct. at 1368). To be sure, the precursor legislation does include the provisions "[t]hat the Coeur d'Alene Tribe of Indians shall be paid the appraised value of said lands, . . ." 41 Cong.Rec. 3715 (1907). However, the legislative history does little to instruct as to the meaning of "appraisal" and what it was

meant to encompass.[2] Thus, while payment of a "sum certain" is a persuasive factor, it has been deemed important only when linked contemporaneously with "explicit" termination language[3] or with contemporaneous or previous "slightly less explicit"[4] language of cession. As emphasized in *Rosebud,* "method of payment, whether lump-sum or otherwise, is but one of many factors to be considered." 430 U.S. at 598 n. 20, 97 S.Ct. at 1369 n. 20.

SURROUNDING CIRCUMSTANCES

The state asserts that the language in the patent of 1911 indicates that the executive branch understood that the reservation was terminated and that the United States would hold the right of re-entry in its own right. The state supports this argument by pointing out the patent language, "formerly a part of the Coeur d'Alene Indian Reservation," and "title to revert to the United States of America, absolutely."

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2. The following colloquy took place in the House of Representatives with respect to the amendment which was rejected:

   "Mr. French . . . There will be a nominal price put upon the land by the board of appraisers.

   Mr. Mann. What does the gentleman mean by a 'nominal' price?

   Mr. French. The price will be fixed by a board appointed by the Department of the Interior for the purpose of classifying and appraising the value of the land."

   41 Cong.Rec. 4592 (1907).

3. See Opinion at 5650-5651.

4. *Id., see also DeCoteau v. District Cty. Ct.,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

[11] Subsequent legislation, while not always without significance, usually is not entitled to much weight in construing earlier statutes. *Namen II,* 665 F.2d at 960 (quoting *Mattz v. Arnett,* 412 U.S. 481, 505 n. 25, 93 S.Ct. 2245, 2258 n. 25, 37 L.Ed.2d 92 (1973)). The language presented here is not entitled to much weight, because it fails to positively support the state's position. A plain reading of the "absolutely" phrase explains the *State of Idaho's* status if the patent's conditions were to be violated. That is, if the conditions were violated, Idaho would lose all of *its* title to the lands. The language does not explain the status of the United States' title upon re-entry.

A description of withdrawn lands as being "formerly" a part of the reservation is not entitled to much weight either, because the patent is the only document offered by the state as identifying the lands as having such a status. See *Namen II,* 665 F.2d at 960 (same argument rejected by court where only two statutes referred to reservation as "former," when tribe produced seventy-two statutes describing reservation as still existing).

The state points to a letter[5] dated March 20, 1909, from the United States Secretary of the Interior to the Governor of the State of Idaho concerning the antici-

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5. It will be noted that the Act referred to authorizes this Department to convey any part of said lands to the State, and of course, until such conveyance is consummated, the *title to the land rests with the federal government.* [Emphasis added]

pated conveyance in which it is stated that the title "rests with the federal government." Again, such a circumstance does little to "clearly" show what government status, trustee or otherwise, the reference is made.

That it can just as easily be said that the Secretary of Interior would use the term "federal government" to indicate trustee rather than grantee status, can be discerned from the Solicitor's Opinion to the Secretary of the Interior. *See, e.g.,* SOLICITOR'S OPINION, 59 I.D. 393, 394 (1947) (draws the conclusion that since the Act of May 27, 1902, 32 Stat. 263 "contain[ed] no declaration that title to the minerals shall vest absolutely in the United States, nor does it make any provisions, it would seem to be clear that the United States, after enactment of the act, continued to hold the title to the surface and to underlying minerals in trust for the Indians. . . .").

[12] Finally, the state contends that Idaho's civil and criminal laws were applicable within the park lands. Idaho Sess.Laws 1911 at 335-36 (Sec. 5). The unquestioned exercise of jurisdiction can be helpful in gleaning the meaning to be attributed to relevant statutes. *See, e.g., Rosebud,* 430 U.S. at 603-04 & n. 27, 97 S.Ct. at 1371-72 & n. 27, *see DeCoteau v. District Cty. Ct.,* 420 U.S. at 449, 95 S.Ct. at 1095. However, under the facts in this case exercise of the state's authority is unhelpful. Regardless of whether the reversionary interest remained in the United States as grantee or trustee, under the statutory

scheme the state could exercise its authority so long as it fulfilled the conditions in the patent.

Therefore, we hold that the state has not established clear congressional intent in the Act of 1908 to extinguish the Tribe's beneficial interest as created in the Act of 1906. Accordingly, the Act of 1908 preserves the Tribe's beneficial interest and correspondingly its right to participate in this litigation.

UNITED STATES' VOLUNTARY DISMISSAL

The state argues that even if the Tribe holds a beneficial interest, the United States' voluntary dismissal from the appeal precludes the Tribe from separately appealing the case. In support, the state relies on *Pueblo of Picuris in State of New Mexico v. Abeyta,* 50 F.2d 12 (CA10 1931), where the Court of Appeals for the Tenth Circuit held that the United States decision not to appeal an adverse decision prevented the tribe from appealing the decision on its own. *See also Nevada v. United States,* — U.S. —, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) (tribe represented by United States in prior action was bound by previous judgment under *res judicata*). We reject the state's argument.

The cases cited by the state involve actions brought by the United States *on behalf of* an Indian tribe. In this case, however, the United States did not institute suit on the Tribe's behalf. The Tribe appeals as a defendant/appellant in Case No. 80-3013, following the district court's

granting of its motion to intervene. Here, the United States was a plaintiff/appellant in Case No. 80-3014, which was consolidated for trial with the former case. As such, this is not a situation similar to the one in *Pueblo* where the tribe attempted to continue the appeal after the United States declined to proceed.

Likewise, the United States has not acted exclusively for the Tribe at any time during this litigation. In fact, the United States has not opposed the Tribe's right to appeal the district court's decision.

The Tribe based its jurisdiction to intervene in part on 28 U.S.C. § 1362, which provides:

> The district court shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The legislative history accompanying the Act states in pertinent part:

> This bill would therefore authorize the addition of only those cases, . . . where the tribes have not been able to show that the amount in controversy exceeds $10,000, *and the Government for some reason does not want to prosecute the case on behalf of the tribe.* . . . [Emphasis added]

Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 711 (CA9 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981) (quoting H.R.Rep. No. 2040, 89th Congress, 2nd Sess., *reprinted in* [1966] U.S.Code Cong. & Ad.News 3145-47).

[13] We find no justification for refusing to allow the Tribe the opportunity to appeal the district court's

decision. Although the present situation differs from one in which the United States has not prosecuted a case at all, we find no reason to depart from the expressed policy of 28 U.S.C. § 1362. See *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1018 (CA9 1973) (quiet title action) (Congress intended by § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act). Having previously decided that the Tribe has a beneficial interest in the withdrawn lands, we now hold that they should not be prevented from protecting that interest in subsequent proceedings.

CONCLUSION

Consequently, the summary judgment of the lower court is set aside and the case remanded for proceedings not inconsistent with this opinion, including, but not limited to, a finding on the nature and extent of the beneficial interest owned by the Tribe in the property mentioned. If the court holds that the beneficial interest is of sufficient magnitude to create an estate in the property adverse to the rights of the state and the lessees, the court shall define that estate and conclude whether such estate is superior to the rights of the leaseholders and for such other declaration of rights, or lack of them, as the court may deem proper. If so desired, the district court may hold a supplemental hearing on the subjects mentioned in this remand.

IT IS SO ORDERED.

QUACKENBUSH, District Judge, concurring in part, and dissenting in part.

I agree with the majority that the fact of the 1908 Act, taken with its legislative history and surrounding circumstances did not demonstrate a clear Congressional intent to compensate the Tribe for a fee taking of the Heyburn lands. As a result, the Tribe retains a beneficial interest in the lands, and the United States retains its trustee status with respect to the Tribe. I also agree with the other panel members that the vountary dismissal by the United States did not preclude further prosecution of this appeal by the Tribe. This separate writing is only to respectfully disagree with a remand, because it is appropriate now to address the issue raised by appellants and previously decided by the district court of whether the State has violated the conditions of the Patent.

The status of the United States as trustee or as grantor runs only to the issue of standing of the Tribe to appeal, but does not bear upon the question of whether the State violated the conditions of the Patent in such a way as to entitle the United States to re-enter the Heyburn Park lands. Also, whether the United States' right to re-enter is as trustee, rather than as a grantor, is unrelated to the question of whether the State violated the Patent conditions. Thus, the "scope" of the beneficial interest retained in the Tribe runs only to standing.

The majority remands this case to the district court with instructions to determine the nature and extent of the Tribe's beneficial interest and "whether such estate is superior to the rights of the leaseholders . . ." In my

opinion, such a remand is unnecessary since it only raises the question of the standing of the Tribe to pursue the appeal. The Tribe was allowed to intervene at the district court level and this panel has determined that the Tribe has a beneficial interest in the property. Clearly, the Tribe has standing to pursue the appeal. There is nothing left for the district court to determine and this panel should now decide the very issue which brought the case to this court, that is, the district court's decision that the condition subsequent was not violated and that the interest of the State of Idaho in the land in question should not be subject to forfeiture.

I respectfully dissent from the remand.

EXHIBIT II

United States Court of Appeals, Ninth Circuit.

No. 80-3013.

STATE OF IDAHO, Plaintiff-Appellee,

and

MEMBERSHIP OF HEYBURN STATE PARK, LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenor Appellee,

v.

THE HONORABLE CECIL D. ANDRUS, Secretary of Department of the Interior of the United States of America, Defendant/Appellant,

and

THE COEUR D'ALENE TRIBE OF INDIANS,
Defendant/Intervenor Appellant.

ORDER

(Filed Feb. 15, 1984)

Appeal from the United States District Court
District of Idaho

Before: KILKENNY and SNEED, Circuit Judges, and QUACKENBUSH, District Judge.*

KILKENNY, Circuit Judge:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

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* The Honorable Justin L. Quackenbush, United States District Judge for the Eastern District of Washington, sitting by designation.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

EXHIBIT III

United States Court of Appeals, For The Ninth Circuit.

No. 80-3013

D. C. No. 1-76-231—77-2058

STATE OF IDAHO, Plaintiff-Appellee,

and

Membership of Heyburn State Park Leaseholders Association, Plaintiff/Intervenor Appellee,

v.

The Honorable Cecil D. ANDRUS, Secretary of the Department of the Interior of the United States of America, Defendant,

and

The Coeur d'Alene Tribe of Indians, Defendant/Intervenor Appellant.

Appeal from the United States District Court from the District of Idaho

ORDER

(Filed August 5, 1981)

Marion J. Callister, U.S. District Judge Presiding

Before: KILKENNY and SNEED, Circuit Court Judges, and QUACKENBUSH,* District Judge.

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* The Honorable Justin L. Quackenbush, District Judge, United States District Court for the Eastern District of Washington, sitting by designation.

In 1908, Congress enacted 25 Stat. 70 which permitted the State of Idaho to purchase from the United States land withdrawn from allotment on the Coeur d'Alene Indian Reservation. Following the conveyance by patent, the State instituted a cottage leasing practice which appellant contends violates a condition subsequent in the patent requiring that the property be used for park purposes. Violation of the condition gives the United States a right to re-enter the lands and terminates any interest in the State.

The State brought an action in the Idaho District Court naming the United States as defendant and seeking a declaratory judgment of its compliance with the patent condition. The action was consolidated with a suit filed later by the United States to enforce the patent condition and to quiet title to the property in the United States. The Coeur d'Alene Indian Tribe was granted "limited" leave to intervene as a defendant.

The trial judge granted summary judgment in favor of the State, and the United States and the Tribe appealed. We granted the Government's motion for voluntary dismissal of their appeal, and denied the Tribe's motion for reconsideration of the Government's dismissal.

Just prior to oral argument of the Tribe's appeal, the State moved to dismiss. There is no mention in the patent of the Coeur d'Alene Tribe as a grantor or as holding any reversionary or beneficial interest under the patent. The enabling act for the patent is similarly silent as to a reversionary interest in the Tribe. Accordingly, it is argued, the reversionary interest flows solely to the United States, and no case or controversy exists as to the Tribe.

We are under a duty to ascertain whether jurisdiction exists to entertain any appeal. Although the Tribe was permitted to intervene in the District Court action, the trial court's order indicates that the intervention was limited, and there is no finding of whether the Tribe has a beneficial interest. Nor does the record otherwise reveal whether the matter was considered; the issue is not addressed in the District Court's Memorandum Opinion.

Consequently, before we may determine whether the Tribe has standing to prosecute an appeal, the trial court must decide the question of the Tribe's beneficial interest, if any. We therefore remand for that limited purpose, but reserve decision on all other issues of the appeal. Upon the determination of the reversionary interest question, this matter shall be returned to this panel.

REMANDED.

EXHIBIT IV

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-3014 DC# CV 1-76-231—77-2058 MJC

Idaho (Boise)

THE STATE OF IDAHO, Plaintiff-Appellee,

vs.

THE HONORABLE CECIL D. ANDRUS, Secretary of the Department of the Interior, etc., et al., Defendants-Appellants.

THE UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

STATE OF IDAHO, et al., Defendants-Appellees.

ORDER

(Filed March 10, 1981)

Before: BROWNING and FARRIS, Circuit Judges

Upon due consideration, the motion of the Coeur d'-Alene Tribe of Indians for vacation and reconsideration of the June 12, 1980 order dismissing this appeal is denied.

EXHIBIT V

The STATE OF IDAHO, Plaintiff,

and

The Membership of the Heyburn State Park Leaseholders Association,

Plaintiff/Intervenors,

v.

The Honorable Cecil D. ANDRUS, et al., Defendants,

and

The Coeur d'Alene Tribe of Indians,

Defendant/Intervenor.

The UNITED STATES of America, Plaintiff,

v.

The STATE OF IDAHO, et al., Defendants.

Civ. Nos. 1-76-231, 77-2058.

United States District Court, D. Idaho.

Aug. 10, 1982.

In proceedings relating to whether state violated terms of patent by which land formerly part of Indian reservation was conveyed to state for public park purposes, case was remanded by the Ninth Circuit Court for consideration of issue whether tribe, which had become sole appellant from determination that terms of patent had not been violated, had any beneficial interest in subject land. The District Court, Callister, Chief Judge, held

that where land which was originally part of Indian reservation was withdrawn from allotment and sale, for purposes of establishing public park and the United States thereafter conveyed land to state under patent for consideration in amount of appraised value, Indian tribe did not retain any beneficial interest in the United States' right of reentry upon use of land for other than park purposes, in light of language in authorizing statute and in patent evidencing congressional intent to diminish reservation lands and extinguish tribal rights to subject land.

So ordered.

* * * * *

David H. Leroy, Atty. Gen. of Idaho, Boise, Idaho, for State of Idaho.

David W. Hyde, Martin, Chapman, Martin & Hyde, Boise, Idaho, for Leaseholder defendants.

Guy Hurlbutt, U.S. Atty., D. Idaho, Boise, Idaho, for defendants Andrus, et al.

Robert D. Dellwo, Dellwo, Rudolf & Schroeder, Spokane, Wash., for the Coeur d'Alene Tribe of Indians.

MEMORANDUM DECISION

CALLISTER, Chief Judge.

This matter is before the Court on remand from the Ninth Circuit to determine whether the Coeur d'Alene Indian Tribe (Tribe) has a beneficial interest in the patent of June 29, 1911, by which the United States conveyed to the State of Idaho the land now comprising Heyburn State Park. The Court has already ruled that the State has not violated the terms of the 1911 patent. The Tribe and the

United States appealed that decision. Shortly thereafter, the United States moved for, and was granted, dismissal of its appeal. The State then moved to dismiss on the ground that the Tribe, now the sole appellant, had no beneficial interest in the Heyburn land. The Ninth Circuit remanded the case for consideration of that issue.

In 1873, the Coeur d'Alene Indian Reservation, comprising 590,000 acres, was established by Executive Order of President Grant. In 1906, Congress enacted the Coeur d'Alene Allotment Act, 34 Stat. 335, authorizing the Secretary of the Interior to allot 160 acres of land to each member of the Tribe. The surplus unallotted lands were then to be opened up to settlement and entry under the provisions of the Homestead Laws, 34 Stat. 335, 336.

Before the Reservation was opened for settlement, however, Congress, by the Act of 1908, 35 Stat. 70, withdrew the Heyburn land, comprising 6,774.65 acres, from allotment and sale. The 1908 Act authorized the Secretary of the Interior to convey the land to the State to be maintained as a public park:

> That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to-wit: Sections one, two, and twelve, township forty-six north, range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven, north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township is reserved and withdrawn from

allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, said conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

The Heyburn land was conveyed to the State for $11,379.17 on June 28, 1911, under a patent setting forth the following conditions:

> WHEREAS, THE ACT OF CONGRESS APPROVED APRIL 30, 1908—35 STAT., 70-78—, AUTHORIZES THE CONVEYANCE TO THE STATE OF IDAHO OF THE FOLLOWING DESCRIBED SUBDIVISIONS OR ANY PART THEREOF, FORMERLY A PART OF THE COEUR D'ALENE INDIAN RESERVATION IN IDAHO. . . .
>
> WHEREAS, BY APPRAISEMENT UNDER DIRECTION OF AND APPROVED BY THE SECRETARY OF THE INTERIOR, THE PURCHASE PRICE TO BE PAID BY THE STATE OF IDAHO FOR THE SAID LANDS HAS BEEN FIXED AT $11,379.17, AND SAID SECRETARY HAS DIRECTED THAT SAID LANDS BE CONVEYED TO THE STATE, UPON PAYMENT BY IT OF SAID SUM, UPON THE FOLLOWING TERMS AND CONDITIONS, TO-WIT: THE LANDS ARE TO BE BY SAID STATE HELD, USED, AND MAINTAINED SOLELY AS A PUBLIC PARK, AND FOR NO PURPOSE INCONSISTENT THEREWITH, THE TITLE TO REVERT TO THE UNITED STATES OF AMERICA, ABSOLUTELY IF THE SAID LANDS, OR ANY PORTION THEREOF, SHALL NOT BE, OR SHALL CEASE TO BE, SO USED AND MAINTAINED BY THE STATE, OR SHALL

> BE ALIENATED BY SAID STATE; AND IN EVENT OF THE VIOLATION BY THE STATE OF ANY OF THE CONDITIONS OR COVENANTS HEREIN CONTAINED, OR ITS FAILURE TO CARRY OUT THE SAME, THEN THE UNITED STATES MAY THEREUPON OR AT ANY TIME THEREAFTER ENTER UPON, AND INTO THE EXCLUSIVE POSSESSION OF, THE SAID LANDS AND THE WHOLE THEREOF, AND OF ALL IMPROVEMENTS THEREON, AND HAVE, HOLD, SEIZE, AND POSSESS THE SAME; EXPRESSLY EXCEPTING AND RESERVING TO THE UNITED STATES OF AMERICA, HOWEVER, ALL VALUABLE MINERAL DEPOSITS IN THE SAID LANDS, TOGETHER WITH THE EXCLUSIVE RIGHT TO MINE AND REMOVE THE SAME, AND TO PERMIT, LICENSE, OR AUTHORIZE THE MINING AND REMOVAL THEREOF, IN SUCH MANNER, UPON SUCH TERMS, AND UNDER SUCH CONDITIONS AS THE CONGRESS MAY PRESCRIBE; AND ALSO THE RIGHT TO FLOOD OR OVERFLOW THE SAID LANDS, AND TO PERMIT, LICENSE, OR AUTHORIZE THE SAME, FOR DOMESTIC, IRRIGATION, AND POWER PURPOSES. . . .

The issue faced by this Court is whether the Tribe has a beneficial interest in the right of re-entry created in the 1911 patent. The State argues that the 1908 Act extinguished the Tribe's right to the Heyburn land, and that the right of re-entry belongs solely to the United States. The United States, in an amicus curiae brief, and the Tribe argue that the 1908 Act should be read to place the United States as trustee of the Tribe for the purpose of selling the Heyburn land to the State. Thus, the right of re-entry was created by the trustee for the benefit of the Tribe.

In its examination of these arguments, the Court begins with the rule that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909). The threshold issue faced by the Court is whether Congress intended, by the Act of 1908, to diminish the reservation lands. In determining this intent, the Court is cautioned to follow

> the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 36 L.Ed.2d 129, 93 S.Ct. 1257 [1263] (1973); quoting *Carpenter v. Shaw,* 280 U.S. 363, 367, 74 L.Ed. 478, 50 S.Ct. 121 [ ] (1930).

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

But as the *Rosebud* case makes clear,

> [t]he "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau v. District County Court* [420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300] *supra.* In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward dete mining what congressional intent was. *Mattz v. Arnett, supra* [412 U.S. 481] at 505. 37 L.Ed.2d 92, 93 S.Ct. 2245 [at 2258].

Id. at 587, 97 S.Ct. at 1363.

With these guidelines in mind, the Court will now turn to an examination of the "face of the Act, the surrounding circumstances and the legislative history."

The operative language of the 1908 Act provides that the Heyburn lands shall be

> reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, said conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

The Act does not expressly state that the Secretary would be acting as a trustee for the Tribe in the sale of the land to the State. The Court finds this significant in that the 1906 Allotment and Sale Act, from which the Heyburn land was withdrawn by the 1908 Act, did state that "The purpose of this act [is] merely to have the United States act as trustee for said Indians in the disposition and sale of said lands. . . ." The 1906 Allotment and Sale Act provided that any unallotted surplus lands would be sold to settlers under the Homestead Laws, 34 Stat. 335, 336. The fact that these sales would occur, if at all, in the future for unknown prices was a good reason for the United States to act as trustee. But the Heyburn land sale transaction was much different, and it is this difference, discussed below, that the caselaw deems significant in finding a congressional intent to diminish reservation lands.

In consideration for the "withdrawal" of the Heyburn land under the 1908 Act, the Tribe was to receive a sum certain consisting of the appraised value of the Heyburn land. This is shown by the legislative history contained

at 41 CONG. REC. 3,715 (1907), which added a provision that the Tribe "be paid the appraised value of the Land."

The fact that the final draft of the Act stated that the sale would proceed on "such terms and conditions as the Secretary of the Interior shall prescribe" does not change the earlier expressed desire to fully compensate the Indians with a sum certain representing the appraised value of the land. Indeed, the evidence indicates that the final sale price actually paid represented the appraised value of the Heyburn lands in fee simple; the appraised value does not appear to represent a price discounted by the right of re-entry.[1]

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1. The evidence indicates that all parties wanted the land to remain a park so that the lumber companies would not be able to gain control of the property. Apparently, the $11,379.17 figure represented the fair market value of the land. See exhibits attached to Tribe's second request for admissions to Heyburn State Park Leaseholders Association; United States' response to State's request for admissions, Nos. 20, 21; S.Rep. No. 251, 60th Cong., 1st Sess. (1908).

   The appraisal reports do not discuss a discounted value for the right of re-entry. This is probably due to the fact that the appraisal was done almost two years before the right of re-entry language was included in the patent of 1911. Indeed, the inclusion of the right of re-entry language by the Secretary was apparently a surprise even to the Senate. Idaho Senator Weldon Heyburn argued that the right of re-entry language was contrary to the intent of Congress: Heyburn introduced Senate Joint Resolution 114 which directed the Secretary to issue a patent without the right of re-entry condition. The resolution passed the Senate, but Heyburn died shortly thereafter. Without Heyburn's leadership, the resolution died in the House. See 48 Cong.Rec. 8,037-8,038 (1912), United States' response to State's request for admissions No. 22(a)-(e); Deposition of Cox, pp. 155-156.

   All of these circumstances indicate that the $11,379.17 sales price represented the fair market value of the Heyburn land without taking into account the right of re-entry.

The legislative history also indicates that it was the intent of Congress to sell the entire Heyburn land acreage; there was no uncertainty about the amount of land that would be sold. Although the final draft of the 1908 Act gives the Secretary the authority to "convey any part thereof to the State of Idaho," the legislative history indicates that Congress contemplated selling the entire Heyburn land acreage. Correspondence in Senate Report 251, 60th Cong., 1st Sess. (1908) from the Commissioner of Indian Affairs to the Department of Interior ends with the following recommendation:

> We respectfully recommend the setting apart of these lands for a park, and also recommend that the acreage specified in the bill should not be decreased, as it was selected with much care, and no lands are included that are not necessary and appropriate for the purpose to which it is proposed to dedicate them.

In summation, Congress clearly contemplated the sale of the entire Heyburn land acreage for a sum certain representing the appraised value of the land. The evidence further indicates that the United States originally intended to purchase the Heyburn lands to establish a national park. Congress was worried, however, about the maintenance costs of such a park and decided to pass legislation conveying the land to the State. Cox depo., pp. 37-51.

The transaction contemplated by the 1908 Act is thus identical in substance to a purchase of a known amount of Indian lands by the United States for a sum certain. Such a transaction is persuasive evidence of a congressional intent to extinguish the Tribe's rights to the Heyburn lands through the 1908 Act. *Compare DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300

(1975) (payment of sum certain was important factor in finding relinquishment of Tribe's right to land) *with Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (consideration of uncertain future sales of land to settlors was important factor in finding that Tribe retained interest in land).

Because the 1908 Act completely withdrew the Heyburn land from the reservation, the State and the United States were free to thereafter bargain for the inclusion of a right to re-entry clause in the patent. The language of the patent itself is further evidence that the 1908 Act extinguished the Tribe's rights to the Heyburn land:

> WHEREAS, THE ACT OF CONGRESS APPROVED APRIL 30, 1908—35 STAT., 70, 78—, AUTHORIZES THE CONVEYANCE TO THE STATE OF IDAHO OF THE FOLLOWING DESCRIBED SUBDIVISIONS OR ANY PART THEREOF, FORMERLY A PART OF THE COEUR D'ALENE INDIAN RESERVATION IN IDAHO. . . . (emphasis added)

The patent goes on to vest the right of re-entry in the "United States, absolutely." There is no language in the patent that the United States was acting as a trustee for the Tribe.

All of these circumstances convince the Court that Congress, through the 1908 Act, intended to extinguish the Tribe's interest in the Heyburn lands. The United States was therefore not acting as the Tribe's trustee in the disposal of those lands. Thus, the Tribe does not have a beneficial interest in the right of re-entry.

The Tribe argues that even if the 1908 Act extinguished their rights to the Heyburn land, they are never-

theless a third party beneficiary of the 1911 patent which created the right of re-entry. The right was created, the Tribe argues, to protect the Tribe's traditional camping and fishing activities on the Heyburn lands.

Idaho law contains a statutory recognition of the right of a third party to maintain an action on a contract executed for his benefit. Idaho Code Section 29-102 provides:

> A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

This statutory recognition of third party beneficiary actions was elaborated upon by the Idaho Supreme Court in *Stewart v. Arrington Construction Co.*, 92 Idaho 526, 532, 446 P.2d 895 (1968):

> To begin with, the contract itself must express an intent to benefit decedent or appellants. . . . This intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered.

There is no intent to benefit the Tribe expressed on the face of the 1911 patent. The Court can find no ambiguity in the 1911 patent which would require the examination of extrinsic evidence. But even if the patent is construed as being ambiguous, the circumstances surrounding the Heyburn land sale do not support the Tribe's claims.

The legislative history of the 1908 Act indicates that the Heyburn land was withdrawn to create a park from which the public would benefit. *See* S.Rep. 251, 60th

Cong., 1st Sess. (1908)[2] The Court can find no intent to benefit the Tribe in a manner separate and apart from the obvious desire to benefit the pub... Where the group to be benefited is large and vaguely defined, individual members are no more than incidental beneficiaries, and no rights are created in them by virtue of the contract at issue. *See Stewart v. Arrington Construction Co., supra.* The Tribe is therefore not a third party beneficiary of the 1911 patent.

The Tribe next argues that the Act of May 19, 1958, P.L. 85-420 §§ 1-3, 72 Stat. 121, "restored" the right of reentry to the Tribe even if the United States did have the sole interest in the right. The 1958 Act provides as follows:

> Sec. 1. All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:
>
> | Reservation and State | Approximate Acreage |
> |---|---|
> | Klamath River, California | 159.77 |
> | Coeur d'Alene, Idaho | 12,877.65 |
> | Crow, Montana | 10,260.95 |
> | Fort Peck, Montana | 41,450.13 |
> | Spokane, Washington | 5,451.00 |

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2. The Senate Report contains correspondence from the Office of the Commissioner of Indian Affairs to the Department of the Interior which provides in pertinent part:

> [W]e would say that the Indians in their council meeting held on the 27th instant unanimously voted in favor of the establishment of this park, as it is a favorite camping and fishing place for them as well as for the white people in this vicinity.

> Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act [this note] shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.
>
> Sec. 3. The lands restored to tribal ownership by this Act [this note] may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

There is nothing in the Act to indicate that the Heyburn land has been classified as "vacant and undisposed of ceded lands." Not only has the Heyburn land been "disposed of" (by sale to the State), it has also been used as a park and would therefore not appear to be classified as "vacant." A fair reading of the 1958 Act would indicate that it was designed to restore to tribal ownership those unallotted lands which had been declared surplus under the 1906 Allotment Act, 34 Stat. 345, but which had never been "disposed" of by the United States. The Heyburn lands were, however, withdrawn from the 1906 Act. Thus, the Tribe's argument that the 1958 Act supports their claim to an interest in the right of re-entry is without merit.

The Tribe's final argument is that it never agreed to the sale of the Heyburn land. The Tribe points to Article 5 of the Act of March 3, 1891, 26 Stat. 989, as supporting their claim. Article 5 reads as follows:

> In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held foreover as Indian land and as homes

> for the Coeur d'Alene Indians, now residing on said Reservation, and the Spokane or other Indians who may be removed to said Reservation under this agreement, and their posterity: And no part of said Reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said Reservation.

Contrary to the Tribe's allegations, there is some indication that an agreement was reached. The correspondence set forth in note 2 of this opinion indicates that,

> The Indians in their council meeting held on the 27th instant unanimously voted in favor of the establishment of this park. . . .

Even assuming that no agreement had been reached, the Heyburn land sale would still be valid. The Supreme Court in *Rosebud Sioux Tribe v. Kneip, supra,* faced this very issue and held that a lack of consent was not fatal to a United States sale of Indian land:

> By the time of the first of these Acts, in 1904, Congress was aware of the decision of this Court in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903), which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treat. *Id.* 430 U.S. at 587-588, 97 S.Ct. at 1363-1364.

The Court originally allowed the Tribe to intervene to give them the opportunity to argue their claims regarding the Heyburn lands. The Court now holds that the Tribe does not have a beneficial interest in the right of re-entry created in the 1911 patent.

EXHIBIT VIa

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-231

THE STATE OF IDAHO, Plaintiff and
THE MEMBERSHIP OF THE HEYBURN STATE
PARK LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenors,

vs.

THE HONORABLE CECIL D. ANDRUS, et al.,
Defendants and
THE COEUR D'ALENE TRIBE OF INDIANS,
Defendant/Intervenors.

Civil No. 77-2058

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE STATE OF IDAHO, et al., Defendants.

ORDER

(Filed November 8, 1979)

This matter having come before the Court on separate motions for summary judgment filed by the United States and by the State of Idaho; and the Court, having considered the arguments of counsel, the pleadings and other documents on file, and having entered a memorandum decision herein finding and concluding that, as to all issues raised in the complaint, there are no genuine issues of material fact remaining to be decided and that, as a matter of law, the State of Idaho is entitled to summary judgment;

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion for summary judgment of the State of Idaho be, and the same is hereby, GRANTED, and the motion for summary judgment of the United States be, and the same is hereby, DENIED.

DATED this 8th day of November, 1979.

/s/ MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

EXHIBIT VIb

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-231

STATE OF IDAHO, Plaintiff

and

MEMBERSHIP OF HEYBURN STATE PARK
LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenors

v.

THE HONORABLE CECIL D. ANDRUS, et al.,
Defendants and

THE COEUR D'ALENE TRIBE OF INDIANS,
Defendant/Intervenors.

Civil No. 77-2058

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE STATE OF IDAHO, et al., Defendants.

MEMORANDUM DECISION

(Filed November 8, 1979)

This matter is now before the Court on cross motions for summary judgment. This Court has carefully reviewed the pleadings, briefs and exhibits and finds that the basic facts are not in dispute.

I. HISTORY OF THE CASE

United States Senator Weldon B. Heyburn introduced legislation in 1907 to create a national park around

Lake Chatcolet in northern Idaho. The park was to be created out of a portion of the Coeur d'Alene Indian Reservation. The bill was later changed to allow the State of Idaho to buy the land for park use. Congress passed, and President Taft signed, the bill in 1908. The land was then appraised at $11,379.17 and the State forwarded the full amount to the Secretary of the Interior as payment for the lands.

On June 28, 1911, the United States of America, by Patent No. 213295, conveyed the property to the State of Idaho. The patent was issued upon the following terms and conditions:

> The lands are to be by said State held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into exclusive possession, of the said lands. . . .

Senator Heyburn was upset that the limitations had been included and introduced Senate Joint Resolution 144 directing the Secretary of the Interior to issue "a good and sufficient conveyance by patent, in lieu of the conditional patent heretofore issued. . . ." The Senate passed the resolution, but Senator Heyburn died before the House acted.

Following the conveyance, the State of Idaho designated the area as Heyburn State Park. It has since leased

cottage sites within the Park and issued float home permits to private individuals for terms of up to ten years.

In a letter dated March 3, 1976, the Office of the Solicitor of the Department of the Interior informed the Attorney General of the State of Idaho that, by virtue of its leasing practices in Heyburn State Park, "the State of Idaho is not in compliance with the conditions of the conveyance and . . . unless the State undertakes immediate corrective action, all the lands included in the 1911 deed are subject to the forfeiture to the United States."

On March 9, 1976, the Idaho State Board of Land Commissioners decided not to renew the leases as they expired. Despite the action by the Board, the lessees have remained in possession of the leased premises.

The State brought an action on December 30, 1976, asking for a declaratory judgment that it is in compliance with the provisions of the conveyance and, in the alternative, that the Board of Land Commissioners' decision not to renew the leases constitutes satisfactory compliance with the directives of the Department of Interior letter.

Subject to some procedural limitations, the Court allowed the Coeur d'Alene Indian Tribe to intervene as defendant and allowed certain leaseholders in the Park to intervene as parties plaintiff.

The United States, on September 7, 1977, filed suit to enforce the provisions of the patent and to quiet title to the property in the United States. This action was later consolidated with the State's action for a declaratory judgment.

II. ISSUES

At the heart of this controversy lie two major issues:

1. Has the State alienated the lands in violation of the conditions of the patent?

2. Has the State, by virtue of its leasing practices, violated the proviso that the lands are to be maintained solely as a public park, thereby entitling the United States to re-enter the lands?

III. FINDINGS OF FACT

The evidence in the record is undisputed that:

1. The Coeur d'Alene Tribal Council voted unanimously in favor of the creation of a park around Lake Chatcolet;

2. Float homes have existed on Lake Chatcolet since at least 1911, the date title passed to the State, and cottage site leasing has occurred since at least 1920;

3. The practice of leasing cottage sites in public parks was prevalent at the time the patent was issued;

4. The number of leased cabin sites has always been minimal. At the time this action was commenced, the State of Idaho had granted 161 leases covering less than 21 acres. These sites are so located as not to detract from the use of the Park by the public, and in fact have increased the overall use of the Park by the public. The number of float homes is likewise small. At present there are 32 float homes in the Park, all of which are located so as to maximize the use of the Park;

5. The State's issuance of float home permits and leasing of cottage sites continued for over a half century without eliciting any comment or criticism from the Tribe or the United States; and

6. In 1972, an Assistant Area Director of the Bureau of Indian Affairs, on behalf of the Tribe, wrote to the Director of the Idaho Department of Parks suggesting that the cottage site leasing program violated the terms of the patent.

IV. CONCLUSIONS OF LAW

It is clear that the patent conveyed to the State of Idaho a fee simple subject to a condition subsequent, and that the United States retained only a right of entry or power to terminate the estate if the State failed to observe the conditions in the patent.

The Court, in ruling on the motions of the parties in this case, is conscious of the familiar maxim that "equity abhors a forfeiture." This maxim bespeaks a general judicial hostility toward the forfeiture of estates long held by grantees. *Bornholdt v. Southern Pacific Company,* 327 F.2d 18 (9th Cir. 1964). Thompson records that "the courts are inclined not to construe a state of facts as constituting a breach of a condition subsequent unless such a situation clearly exists." 4 THOMPSON ON REAL PROPERTY § 1866, at 626 (1979).

The Alienation Issue.

Defendant observes that the leases are issued on a long-term basis and have been routinely renewed. This, the United States contends, has effectively created a fee

title interest in the leaseholders and entitles the United States to re-enter and repossess the lands. Such is not the law, however. Alienation refers to the passage of title to real estate and occurs only when divestiture has been complete. Since the State is under no obligation to renew the leases, the fact that the leases run for ten years and have generally been renewed does not transform them into absolute conveyances. In *Boulton v. Telfer*, 52 Idaho 185, 12 P.2d 767 (1932), *cert. denied*, 287 U.S. 655 (1932), a homestead entrant had leased the land to plaintiff for grazing purposes. When plaintiff sued the defendant for trespass, the defendant claimed that the homestead entrant, by leasing the land to plaintiff, had alienated the land in violation of federal statutes. The court disagreed: "Alienation within the meaning and spirit of said sections must affect the title or be such a conveyance of such a qualified interest as might become absolute on patent passing from the United States." *Id.* at 192, 12 P.2d at 770. The Court, therefore, concludes as a matter of law that the State has not alienated the lands in violation of the patent conditions.

The Public Park Purposes Issue—Construing the Provisions of the Patent.

The language in the patent which requires that the lands be "held, used, and maintained solely as a public park, and for no purpose inconsistent therewith" is ambiguous. As a result, the language must be construed in light of its meaning at the time title passed to the State. It is an established principle to be applied in construing deeds that "the language of an instrument must be interpreted in light of the subject matter, the apparent object or purpose of the parties and the conditions existing when

the deed was executed." *United States v. Zorger,* 407 F. Supp. 25, 30 (W.D. Penn. 1976), *aff'd* 546 F.2d 421 (3rd Cir. 1976); *National Lead Company v. Kanawha Block Co.,* 288 F. Supp. 357 (S.D. W.Va. 1968), *aff'd* 409 F.2d 1309 (4th Cir. 1969); *Hogan v. Blakney,* 73 Idaho 274, 251 P.2d 209 (1952). *cf. Platt v. Union Pacific Railroad Co.,* 98 U.S. 48 (1978).

Cottage site leasing programs were common in state and national parks when Idaho acquired Heyburn State Park. This fact leads the Court to conclude that the State's practice of leasing cottage sites and issuing float home permits was an accepted public park use at the time title passed to the State.

Although the uses complained of were acceptable public park uses at the time the patent was issued, and thus not prohibited by the terms of the patent, it appears to the Court that the continued existence of private leaseholds in the Park may at some future date encroach upon the use of the Park by the general public. Such use might then violate the terms of the patent. In such a contingency, in view of the long accepted lease practice, equity would require notice be given to the State, and a hearing held to determine whether such use did in fact substantially interfere with the general public's use of the Park. Furthermore, under the facts of this case, the State should in any event be allowed a reasonable time and method to solve existing problems by appropriate action before any forfeiture should be permitted.

Accordingly, the Court concludes that the United States is not entitled to re-enter and repossess the land.

The Court, upon stipulation of the parties and in the presence of counsel, viewed the premises involved in the

litigation. The Park, which was visited by approximately 250,000 people last year, has facilities for picnicking, hiking, swimming, and boating. Camping sites have also been provided for those who wish to stay overnight. Furthermore, the State has plans for expanding the picnicking and camping facilities and has located several areas more suitable for such development than the sites occupied by the cabins. Thus the cabin sites do not presently prevent continued development and use of the Park.

After considering the pleadings and evidence in the record, and after viewing the Park, the Court finds that neither the cabin sites nor the float homes have substantially interfered with the public's use of the Park. In fact, it is likely that, particularly in the Park's early history, the leasing of home sites increased rather than decreased the enjoyment of the Park by members of the public, and provided funds needed to maintain and develop the Park.

In summary, the Court concludes that the leasing of cottage sites and granting of float home permits was a proper public park use at the time Heyburn State Park was established and, therefore, cannot be the cause of forfeiture under the terms of the patent. The Court further concludes that these practices do not now substantially interfere with the public's use of Heyburn State Park. Consequently, the Court concludes that the State is in compliance with the provisions of the 1911 patent.

In light of the foregoing considerations, the Court determines that there are no genuine issues of material fact remaining for resolution, and that, as a matter of law, the State of Idaho is entitled to summary judgment.

DATED this 8th day of November, 1979.

/s/ MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

EXHIBIT VIc

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-231

THE STATE OF IDAHO, Plaintiffs and
THE MEMBERSHIP OF THE HEYBURN STATE
PARK LEASEHOLDERS ASSOCIATION,
Plaintiff/Intervenors,

vs.

THE HONORABLE CECIL B. ANDRUS, et al.,
Defendants and

THE COUER d'ALENE TRIBE OF INDIANS,
Defendant/Intervenors,

Civil No. 77-2058

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE STATE OF IDAHO, et al., Defendants.

ORDER

(Filed August 10, 1982)

The Court has reviewed the entire record in this matter, including the extensive briefing done by the parties and the United States as amicus curiae. Based on this record, the Court hereby finds, in accordance with the memorandum decision filed concurrently with this order, that the Coeur d'Alene Indian Tribe does not have a beneficial interest in the Heyburn State Park land which was conveyed by the United States to the State of Idaho by patent dated June 28, 1911.

IT IS SO ORDERED this 6th day of August, 1982.

/s/ MARION J. CALLISTER, Chief Judge
United States District Court

EXHIBIT VII

COEUR D'ALENE ALLOTMENT AND SETTLEMENT ACT OF 1906, 34 Stat. 335, III Kappler 204

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and sixty acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior as agricultural lands, grazing lands, or timber lands, and shall be appraised under their appropriate classes by legal subdivisions, and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws, at not less than their appraised value, in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre, by proclamation of the President, which proclamation shall prescribe

the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof: *Provided,* That the price of said lands when entered shall be fixed by the appraisement, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry, and in case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall cease, and any payment theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry: *Provided,* That the right to commute by said entryman shall be allowed as to any lands classified as agricultural and grazing lands, but the entryman, upon commutation, shall not be required to pay in the aggregate any sum in excess of the appraised value of such lands; and nothing in this act shall be held to repeal or extend the provisions of the homestead laws permitting the entryman to cut and remove, or cause to be cut and removed, so much timber as is actually necessary for buildings, fences, and other improvements on the land entered: *Provided further,* That the general mining laws of the United States shall extend after the approval of this act to any of said lands and mineral entry may be made on any of said lands, but no such mineral selection shall be permitted upon any lands allotted in severalty to the Indians: *Provided further,* That all the coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States, and no patent that may be issued

under the provisions of this or any other act of Congress shall convey any title thereto: *Provided further,* That the lands remaining undisposed of at the expiration of five years from the opening of the said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold ten years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price: *And provided further,* That sections sixteen and thirty-six of said lands be, and they are hereby, excepted from the foregoing provisions and are hereby granted to the State of Idaho for school purposes, and the United States shall pay to said Indians therefor the sum of one dollar and twenty-five cents per acre: *And provided also,* That if the State of Idaho has made any selections under existing law in lieu of sections sixteen and thirty-six of the lands affected by this act the acreage of such selections shall be deducted from the acreage to be paid for under the preceding proviso.

That the said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter any of said lands except as prescribed in such proclamation.

That the Secretary of the Interior shall reserve from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes as in his opinion may be required for the tfuture public interests, and he may cause any

such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians as provided in section seven of this act.

That the net proceeds arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands, shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales and surveys herein provided, deposited in the Treasury of the United States to the credit of the Coeur d'Alene and confederated tribes of Indians belonging and having tribal rights on the Coeur d'Alene Indian Reservation, in the State of Idaho, and shall be expended for their benefit, under the direction of the Secretary of the Interior, in the education and improvement of said Indians and in the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horserakes, thrashing machines, and other agricultural implements for issue to said Indians, and also for the purchase of material for the construction of houses or other necessary buildings, and a reasonable sum may also be expended by the Secretary, in his discretion, for the comfort, benefit, and improvement of said Indians: *Provided,* That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if in the opinion of the Secretary of the Interior such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise: *Provided,* That any sums placed in the Treasury of the United States to the credit of said Indians shall bear interest

at the rate of three per centum per annum, which interest shall be expended in the same manner as the principal.

That any of said lands necessary for agency, school, and religious purposes, including any lands now occupied by the agency buildings, and the site of any sawmill, gristmill, or other mill property on said lands are hereby reserved for such uses so long as said land shall be occupied for the purposes above designated: *Provided,* That all such reserved lands shall not exceed in the aggregate three sections and must be selected in legal subdivisions conformable to the public surveys, such selection to be under the direction of the Secretary of the Interior and subject to his approval.

That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this act, until all of the lands shall have been disposed of.

That nothing in this act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

That to enable the Secretary of the Interior to allot, classify, appraise, and conduct the sale and entry of said

lands as in this act provided the sum of fifteen thousand dollars, or so much thereof as may be necessary, is hereby appropriated from any money in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided,* That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and otherwise carrying out the provisions of this act.

EXHIBIT VIII

HEYBURN ACT OF 1908, 35 Stat. 70, 78, III Kappler 326

That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to wit: Sections one, two, and twelve, township forty-six north, range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven, north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township is reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, said conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

EXHIBIT IX

PRESIDENTIAL PATENT OF JUNE 29, 1911

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

Whereas, the Act of Congress approved April 30, 1908 —35 Stat., 70, 78—, authorizes the conveyance to the State of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur d'Alene Indian Reservation in Idaho, viz: Sections one, two, and twelve, Township forty-six North, Range four West, Boise Meridian; Section thirty-five and thirty-six, Township forty-seven North, Range four West, Boise Meridian; all of those portions of Sections two, three, four, five, six, seven, eight, nine, ten and eleven, Township forty-six North, Range three West, Boise Meridian, lying south and west of the Saint Joe River in said Township; all of those portions of Sections thirty-one and thirty-two, Township forty-seven North, Range three West, Boise Meridian, lying south and west of the Saint Joe River in said Township, to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at $11,379.17, and said Secretary has directed that said lands be conveyed to the State, upon payment by it of said sum, upon the following terms and conditions, to-wit: the lands are to be by said State held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion

thereof, shall not be, or shall cease to be, so used and maintained by the State, or shall be alienated by said State; and in event of the violation by the State of any of the conditions or covenants herein contained, or its failure to carry out the same, then the United States may thereupon or at any time thereafter enter upon, and into the exclusive possession of, the said lands and the whole thereof, and of all improvements thereon, and have, hold, seize, and possess the same: expressly excepting and reserving to the United States of America, however, all valuable mineral deposits in the said lands, together with the exclusive right to mine and remove the same, and to permit, license, or authorize the mining and removal thereof, in such manner, upon such terms, and under such conditions as the Congress may prescribe; and also the right to flood or overflow the said lands, and to permit, license, or authorize the same, for domestic, irrigation, and power purposes; and

Whereas, the State of Idaho, by the Act of the Legislature thereof approved March 16, 1909, has appropriated out of the public moneys of said State, and made available, the aforesaid sum so fixed by the said appraisement, for the purchase from the United States of the lands aforesaid; and

Whereas, the State of Idaho has applied to purchase, under and by virtue of the said Acts of Congress and the Legislature of the State, all of the above described lands and has made full payment therefor:

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said Act of Congress, has given and granted, and by these

presents does give and grant, unto the said State of Idaho, all and singular the tracts above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said State of Idaho forever; upon and subject, however, to the terms, conditions, and reservations prescribed by the Secretary of the Interior and hereinabove set forth.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the Twenty-ninth day of June in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-fifth.

(SEAL) By the President: /s/ Wm. H. Taft

By /s/ W. P. LeRoy, Secretary,
/s/ H. W. Bryant, Recorder of the
General Land Office

Recorded: Patent Number 213295

EXHIBIT X

CHAPTER 89
AN ACT

To appropriate twelve thousand dollars ($12,000), or so much thereof as may be necessary, for the purchase from the United States of the lands included within the park created out of the Coeur d'Alene Indian Reservation by the Act of Congress of April 30, 1908, (35 statutes at large, 78), and providing for the purchase of said land and for the payment of said sum of money to the treasury of the State of Idaho from the Fish and Game Fund; to name said park Heyburn Park; to create a board of control for the government of said park and to define the duties of said board; to provide for the appointment of a superintendent of said park and to define his duties and fix his compensation; and to repeal an act approved March 16, 1909 (Session Laws 1909 pp. 388-390), and all acts and parts of acts in conflict herewith.

Be it Enacted by the Legislature of the State of Idaho:

Section 1. That the sum of Twelve Thousand Dollars ($12,000), or so much thereof as may be necessary for the purpose herein expressed, is hereby appropirated out of any moneys in the State Treasury, not otherwise appropriated, for the purchase from the United States, and the State Land Board is hereby directed therewith to purchase from the United States for the State of Idaho, as soon as said sum of money is available, all the lands included within the park created out of Coeur d'Alene Indian Reservation by the Act of Congress of April 30, 1908 (35 Statutes at Large, 78), said land being described as follows, to-wit:

Sections 1, 2, and 12, Township 46 north of Range 4 west, Boise Meridian; Sections 35 and 36, Township 47

north of Range 4 west, Boise Meridian; All of those portions of Sections 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Township 46 north of Range 3 west, Boise Meridian, lying south and west of the Saint Joe River in said township; all of those portions of Sections 31 and 32, Township 47 north of Range 3 west, Boise Meridian, lying south and west of the Saint Joe River in said township; said sum being the appraised value and price fixed by the Government to be paid for the said lands included within said park by the terms of said Act of Congress.

Sec. 2. That the name of said park shall be HEYBURN PARK.

Sec. 3. The Governor, the Game Warden and a Commissioner to be appointed by the Governor, and who shall serve without any other or further compensation than his actual and necessary expenses when traveling in the discharge of his duties, and who may be removed from office at the will of the Governor, shall constitute and be a Board of Control of said park. Said Board of Control shall have power and it shall be its duty to make and enforce rules and regulations necessary for the use and government of said park and to determine the manner and provide the means for the enforcement of said rules and regulations.

Sec. 4. The said Board of Control is authorized to make concessions to proper and desirable parties for the establishment of not to exceed three (3) places of refreshment and entertainment within the said park; also to make concessions to parties who will provide suitable boating facilities upon the waters within said park under such restrictions as to use and compensation for use as said

Board of Control may determine; *Provided:* That no private parties shall be permitted to construct wharves within said park.

The said Board of Control shall also have full authority to determine the conditions upon which leases, concessions and privileges shall be granted, subject always to the condition that the park shall be free to public use and the enjoyment of all the people without discrimination as to race, under such rules and regulations as are to be provided as aforesaid.

Sec. 5. All of the laws of the State of Idaho, Civil and Criminal, shall be applicable to said park and enforcible within the boundaries thereof as elsewhere.

Sec. 6. The said Board of Control shall appoint a Park Superintendent, whose duty it shall be to enforce the laws of the State of Idaho and rules and regulations provided by the Board of Control within said park. Said superintendent shall, by virtue of his office, be a Deputy Game Warden and shall have such powers and perform such duties as devolve upon Deputy Game Wardens under the laws of the State of Idaho. His compensation shall be Twelve Hundred Dollars ($1200) a year, to be paid out of the Fish and Game Fund, and he shall give a bond to the State of Idaho for the faithful performance of his duties in the sum to be fixed by the Board of Control.

Sec. 7. All improvements within said park shall be made under direction of the Board of Control and all costs of such improvements, together with the expense of maintaining and governing said park shall be paid out of the Fish and Game Fund, and all revenue derived from said park shall be paid into said fund.

Sec. 8. In order to re-imburse the Treasury of the State of Idaho in the sum of Twelve Thousand Dollars ($12,000) to be paid for said park as provided in this Act, there is hereby appropriated out of the Fish and Game Fund the sum of Twelve Thousand Dollars ($12,000) to be paid into the Treasury of the State of Idaho from said fund as follows:

Three Thousand Dollars ($3000) to be paid during the year 1911; Three Thousand Dollars ($3000) to be paid during the year 1912; Three Thousand Dollars ($3000) to be paid during the year 1913; Three Thousand Dollars ($3000) to be paid during the year 1914.

Sec. 9. The Act of the Legislature approved March 16, 1909 (Session laws, 1909 pp. 388-390) and all Acts and parts of Acts in conflict herewith are hereby repealed.

Approved February 7, 1911.